Supreme Court, U.S.
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In The

Supreme Court of the United States

PATRICK L. KAHAWAIOLAA, ET AL,

Petitioners,

v.

GALE A. NORTON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF

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PATRICK L. KAHAWAIOLAA, ET AL., *Petitioners,*
v.
GALE NORTON, *Respondent.*

PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

A. Reservations and Allotment System

In the Statement portion of her Brief in Opposition, Respondent states that there were no reservations and no allotment system in the Territory of Hawaii. Brief in Opposition ("Br.Op."), p. 2. This is incorrect.

In 1928, at the time of the *Meriam Report,* the Hawaiian Homes Commission Act, 1920 [HHCA], was already in effect, setting aside 203,000 acres of land for 99-year homestead leases exclusively and specifically reserved for native Hawaiians. As such, the Hawaiian home lands are reservations for native Hawaiians. The HHCA set aside lands for domestic dependent communities of native Hawaiians not unlike the Pueblos recognized by this Court in the landmark case of *United States v. Sandoval,* 231 U.S. 28 (1913)

The homestead leases awarded to beneficiaries under the HHCA while not "allotments" under the General Allotment Act, are awards of land exclusively and specifically reserved to individual native Hawaiians similar to allotments. Being leasehold interests, these awards are not alienable and have not resulted in the breakup of the homestead lands. However, lack of self-determination and control over their native lands has

caused many of the same problems for indigenous Hawaiians as for other indigenous Americans. *See Federal-State Task Force on the Hawaiian Homes Commission Act Report to United States Secretary of the Interior and the Governor of the State of Hawaii,* Honolulu, Hawaii, August, 1983; *Hawaiian Homes Commission,* U.S. Dept. of the Interior, Office of Inspector General, Audit Report, Rep. No. 92-I-641, March, 1992; *Management and Financial Audit of the Department of Hawaiian Home Lands,* Auditor of the State of Hawaii, Rep. No. 93-22, December, 1993; Faludi, Susan C., "Broken Promise: How Everyone Got Hawaiians' Homelands Except Hawaiians", *Wall Street Journal,* September 9, 1991, p. 1.

B. Indigenous Hawaiians and indigenous Alaskans.

Respondent states that the "IRA was not made applicable to native Hawaiian groups," but it "did apply to native Alaskan groups." Br.Op., p. 2. This statement may be technically true, but is misleading.

The Indian Reorganization Act [IRA] *does not exclude* indigenous Hawaiians. Section 13 of the IRA as originally enacted, excluded territories, colonies and insular possessions from the Act, with the exception that sections 9-12 and 16 were made applicable to Alaska. 48 Stat. 985, § 13 (1934). Indigenous Hawaiians were excluded *at that time* because Hawaii was a territory. Also, the term "Indian" was defined as certain persons of "Indian descent" or "Indian blood." *Id.,* § 19. Eskimos and other aboriginal Alaskans were specifically listed as included within this definition, but indigenous Hawaiians were not mentioned specifically as included or excluded. *Id.*

In 1936, Congress extended the application of the IRA to Alaska further by making sections 1, 5, 7, 8, 15, 17 and 19 applicable there as well. 49 Stat. 1250, ch. 254, § 1 (May 1, 1936). Presumably, the remaining sections of the IRA became applicable to Alaska upon Alaska's admission to the Union in

1959. Similarly, all of the provisions of the IRA would have become applicable to Hawaii upon *its* admission to the Union in 1959.

ARGUMENT

A. Importance of this case

Respondent argues that certiorari should be denied because the decision of the court below was correct and does not conflict with any of the decisions of other circuits or this court. Br.Op., p. 7.

Petitioners did not argue the merits of the case in the petition, but instead argued, pursuant to Rule 10 of the Rules of the U.S. Supreme Court, that this case involves an "important question of federal law that has not been, but should be, settled by this Court." Respondent did not address the importance issue in her brief in opposition.

On page 7 of the Brief in Opposition, Respondent incorrectly, states "Petitioners argue (Pet. 13-14) that this Court's decision in *Rice v. Cayetano,* 528 U.S. 495 (2000), establishes that the exclusion of native groups in Hawaii from eligibility for federal recognition constitutes impermissible race-based discrimination." Actually, Petitioners argued that this case is *important* because the decision below validates discrimination *against* indigenous Hawaiians under the rational basis standard, while *Rice* applied the strict scrutiny standard to discrimination *in favor* of indigenous Hawaiians.

Of course, Petitioners argued on the merits below that the *Rice* standard should be applied to the exclusion of indigenous Hawaiians from the acknowledgment regulations. Petitioners would renew that argument on the merits in this Court if certiorari is granted. However, the *fact* that a more lenient standard has been used to justify discrimination *against* indigenous Hawaiians than the standard applied to discrimina-

tion in their *favor* should be considered in determining whether this is an important case worthy of review by this Court.

Since the Petition was filed, further evidence of the importance of this case came to light in an article by Senator Akaka where he admitted the purpose of his "Recognition Bill" (reintroduced in the current session as S.B. 147) is to settle land claims as follows:

> Following the recognition of the Hawaiian governing entity, negotiations between the entity and the federal and state governments will begin to address the potential transfer and control of lands, natural resources and assets, and the exercise of governmental authority by the Hawaiian governing entity. This is the structured process that we have needed in the past to address longstanding issues resulting from the overthrow of the kingdom of Hawaii.

"Akaka bill a part of vital process," Honolulu Star-Bulletin, May 1, 2005, p. F7.

Therefore, this case is very important because the decision of the court of Appeals below excludes existing indigenous Hawaiian tribal groups (if indeed, any such group exists under the criteria set forth in 25 C.F.R., Part 83) from participation in these decisions determining the disposition of their tribal lands.

B. Merits of the case.

Petitioners did not consider that the petition was the proper place to argue the merits of the case. However, since Respondent has argued the merits, Petitioners must briefly respond.

Respondent argues that the Court below correctly held that the exclusion of indigenous Hawaiians from the acknowledgment regulations is not race based, because it involves the political classification of Indian tribes, citing *Morton v. Mancari*, 417 U.S. 535 (1974). Br.Op., p. 8. However, the challenged regulation does not discriminate between Indian

tribes. It discriminates between groups of indigenous people and, in fact, that discrimination excluding indigenous Hawaiians is race based.

Consider a regulation providing for the acknowledgment of indigenous groups that specifically prohibited Eskimos from applying. Surely, such a regulation would be race based. The court would not entertain an argument that the historical differences between Eskimos and other indigenous groups rendered the discrimination non-racial. Any such discrimination could be justified only under the strict scrutiny standard of *Adarand Constructors, Inc., v. Pena*, 515 U.S. 200, 227 (1995).

The only difference between this hypothetical regulation and the challenged regulation is that the exclusion of indigenous Hawaiians is not specifically stated. Instead, the discrimination is purportedly geographic. However, the only indigenous people in the excluded geographical area are indigenous Hawaiians. This geographical classification is, indeed, a disguised race based discrimination against indigenous Hawaiians that must be reviewed under the strict scrutiny standard just as an exclusion of Eskimos would be.

Respondent further argues that exclusion of indigenous Hawaiians from the acknowledgment regulations is justified by their exclusion by Congress from the IRA and the Indian Self-Determination and Education Assistance Act, [ISDEA]25 U.S.C. 450-450n. Br.Op., p. 10. As argued above, indigenous Hawaiians have not been excluded from the IRA. Indigenous Hawaiians are not specifically included as are Eskimos, but they are not specifically excluded either. Petitioners have argued below that the term "Indian" as used in the IRA, must be defined in the broadest possible Constitutional sense to include *all* indigenous tribal people regardless of race. Petitioners cited contemporary reports by early explorers referring to indigenous Hawaiians as "Indians." *Cook's Log*, ISSN 1358-0639, vol 6,

no. 2, p. 192 (1983).

As for the ISDEA, it is applicable to recognized Indian tribes, pursuant to 25 U.S.C. § 450b(e). Thus, the only thing that excludes indigenous Hawaiians from the ISDEA is the challenged regulation preventing their application for acknowledgment of their recognition.

Moreover, even if the IRA and/or ISDEA did specifically exclude indigenous Hawaiians from their applicability, that discrimination would also be subject to strict scrutiny review. The purpose of the IRA and ISDEA is to give indigenous Americans control over their own tribal lands, free from interference by the government. Indigenous Hawaiians suffer from the same negative effects of government management of their homelands. There is nothing in the history of Hawaii that would justify the denial of the right of self-determination to indigenous Hawaiians. An unconstitutional discrimination by Congress cannot be used to justify an unconstitutional discrimination by the Respondent.

The final two sentences of Respondent's argument demonstrate its flaw, as follows:

> Congress, however, has yet to recognize native Hawaiians as an Indian Tribe or otherwise establish a government-to-government relationship with them. In these circumstances, it is fully rational for the Secretary of the Interior to exclude native groups in Hawaii from petitioning for acknowledgment as an Indian Tribe under the acknowledgment regulations.

Br.Op., p. 11.

The fallacy of this argument is apparent. It is circular. Indigenous Hawaiian are not entitled to apply for acknowledgment of recognition because they have not been recognized. Petitioner cannot argue that Congress has yet to recognize native Hawaiians as an Indian Tribe unless and until indigenous

Hawaiian groups have had an opportunity to present their evidence and have it evaluated under the standards established in 25 C.F.R., Part 83. Whether Congress has recognized native Hawaiians, is not an issue in this case. That question can be answered only *after* an application is made and the standards applied.

Based on Respondent's firm and fast belief that indigenous Hawaiians have not been recognized by Congress as an Indian tribe or tribes, it is very likely that any application submitted by an indigenous Hawaiian group would be denied. But in that case, at least there would be an evidentiary record as to the factual basis for the group's claim of tribal existence. It is a denial of due process for a court to make this kind of determination without any evidentiary record.

CONCLUSION

Based on the foregoing argument and authorities, Petitioners respectfully request this Honorable Court to grant certiorari to review the opinion of the Ninth Circuit Court of Appeals.

Dated: Honolulu, Hawaii, May 25, 2005.

Respectfully submitted,
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